

**A CRITICAL EXAMINATION OF THE SOCIO-ECONOMIC RIGHTS OF
PRISONERS IN ZAMBIA IN THE CONTEXT OF INTERNATIONAL MINIMUM
STANDARDS**

by

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8. *TAC and Others v Minister of Health and Others* 14 December 2001 Case No. 21182/2001.
9. *Van Viljon and Others v Minister of Correctional Services* 1997 (4) SA 441 (C).

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
AVR	Audio Visual Remand System
C ESCR	Committee on Economic, Social and Cultural Rights
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
SMR	United Nations Standard Minimum Rules for the Treatment of Prisoners
UDHR	Universal Declaration of Human Rights

ABSTRACT

The subject matter pertaining to the socio-economic rights of prisoners, is a subject area that has been neglected by legal academics in Zambia. Therefore, it was only fitting to give this topic, the attention it deserves.

When the topic at hand was elected, it was underlined by three assumptions. The first assumption being that in the Zambian legal system, the socio-economic rights of prisoners are not duly acknowledged, respected and promoted. The second assumption was that prisoners are ill-treated, such that their dignity is taken away by virtue of their confinement to a prison. The last assumption was that Zambia is not abiding by its international and regional minimum human rights law obligations, pertaining to detained persons.

Consequently, the investigations described below were undertaken to prove the validity of these three assumptions.

Firstly, reports of institution such as the Human Rights Commission and the Human Rights Watch, were employed to acquire a more in-depth understanding of the socio-economic conditions in prisons around Zambia. In their totality, the reports revealed that the majority of Zambian prisons are places where human rights violations manifest, due to the inhumane socio-economic conditions and treatment of prisoners.

Secondly, a critical analysis of the provisions relevant to the socio-economic rights of prisoners in the Prisons Act¹ and the Prison Rules² and Zambian Constitution,³ was undertaken. The analysis, aimed at ascertaining the content of the law in so far as recognizing, protecting and realizing the socio-economic rights of prisoners, finds that neither of these pieces of legislation expressly recognize the rights in question. Consequently, the realization of these rights is

¹ See Cap 91 of the Laws of Zambia.

² Ibid.

³ See Act 18 of 1996.

dependant on general law which includes but is not limited to the Public Health Act,⁴ the National Health Services Act⁵ and the National Food and Nutrition Commission Act.⁶

Thirdly, the relevant provisions of both soft and hard international human rights law instruments including the Universal Declaration of Human Rights (UDHR),⁷ the International Covenant on Civil and Political Rights (ICCPR),⁸ the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁹ the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR),¹⁰ the Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment,¹¹ the Basic Principles for the Treatment of Prisoners,¹² the African Charter on Human and Peoples' Rights (ACHPR),¹³ the Kampala Declaration on Prison Conditions in Africa¹⁴ and the Robben Island Guidelines¹⁵ were analyzed.

The analysis of which the focal point is on whether Zambia is complying with the international minimum standards for the treatment of prisoners and prison conditions, leads to the finding that Zambia is in violation of numerous provisions in the aforementioned instruments and that the treatment of prisoners as well as

⁴ Cap 295 of the Laws of Zambia.

⁵ Cap 315 of the Law of Zambia.

⁶ Cap 308 of the Laws of Zambia.

⁷ An instrument of the United Nations adopted in 1948.

⁸ An instrument of the United Nations adopted in 1966.

⁹ Ibid.

¹⁰ An instrument of the United Nations adopted in 1955.

¹¹ An instrument of the United Nations adopted in 1988.

¹² An instrument of the United Nations adopted in 1990.

¹³ An instrument of the African Union adopted in 1981.

¹⁴ An instrument of the African Union adopted in 1996.

¹⁵ An instrument of the African Union adopted in 2002.

the prison conditions in most prisons, falls short of international minimum standards.

In summary, the various reports of a parastatal,¹⁶ the reports of NGO's¹⁷ and the state party reports of Zambia¹⁸ to bodies of the United Nations and African Union, have rendered the abovementioned assumptions, actual facts.

Put differently, the states' failure to domesticate international human rights law, its inability to harmonize national laws and the judiciary's failure to embrace its autonomy, are some of the factors that have resulted in a culture of undermining the value of the socio-economic rights of prisoners, which in turn impedes their realization.

¹⁶ Human Rights Commission. Annual Report (2006); Human Rights Commission. Annual Report (2008); Human Rights Commission. Annual Report (2009); Human Rights Commission. Prison and Police Cells Inspection Report Lusaka Province. (2004); Human Rights Commission. Prison and Police Cells Inspection Report Central Province. (2005); Human Rights Commission. Prison and Police Cells Inspection Report North-Western Province. (2008) and Human Rights Commission. The Welfare of Children in Prisons, Other Detention Centre's and Orphanages. Northern Province. (2009).

¹⁷ Human Rights Watch Report. Unjust and Unhealthy: HIV, TB and Abuse in Zambian Prisons. http://www2.ohchr.org/english/bodies/crc/docs/Discussion2011_submissions/HumanRightsWatch/UnjustandUnhealthyFINAL.pdf (accessed 15 August 2011).

¹⁸ Government Republic of Zambia: CCPR/C/ZMB/CO/3/Add.1 (2009); Government Republic of Zambia Initial Report: African Charter on Human and Peoples' Rights. www.achpr.org/.../state_reports/40_Zambia%20initial%20report_Eng.pdf (accessed 18 September 2011); Government of the Republic of Zambia. Second Periodic Reports of States Parties Due in 1990: Zambia. 10/03/95. CCPR/63/Add.3; Government of the Zambia. Second Report introduced in the Human Rights Committee, 26 March 1996, Concluding Observations of the Human Rights Committee, Zambia, UN Doc CCPR/C/79/Add.62(1996) and Government Republic of Zambia: Universal Periodic Review Report of the Working Group on the Universal Periodic Review Zambia. A/HRC/8/43 (2008).

CHAPTER 1

INTRODUCTION

“In most countries, constitutions with detailed provisions for the protection of fundamental rights and freedoms of all people, including prison inmates, have been enacted.”¹⁹ Furthermore, “legislation has also been passed which makes specific provisions regarding the rights of inmates.”

The above statements are a reflection of the views expressed by Bukurura SH²⁰ in his article “*Emerging Trends in the Protection of Prisoners Rights in Southern Africa*.”²¹ Bukurura is of the view that many Southern African states have adopted mechanisms to harmonize international human rights law and regional human rights law pertaining to the rights of prisoners, with national law. In other words, he avers that states have enacted national legislation that expressly protects the rights of prisoners.

Nevertheless, in relation to Zambia, the views expressed by Bukurura, can only find application where civil and political rights are concerned and not in the case of socio-economic rights.

The reason for this statement, lies in the fact that although Zambia has a written constitution that protects the fundamental rights of all people in the state and an Act and Rules relating to prisons, the state continues to reject the inclusion of justiciable socio-economic rights in the constitution.²²

¹⁹ Bukurura SH. *Emerging trends in the protection of prisoners’ rights in Southern Africa*. Africa Human Rights Law Journal, Vol 2, Issue 1 (2002) p 93.

²⁰ Senior lecturer, Faculty of Law, University of Namibia.

²¹ Africa Human Rights Law Journal, Vol 2, Issue 1 (2002) pp 92-109.

²² Act 18 of 1996.

Furthermore, the socio-economic rights of prisoners are not expressly provided for in the Prisons Act²³ and Prison Rules.²⁴

Consequently, “rights which mandate that social conditions be adequate for meeting physical, moral and biological requirements for every category of people” and rights geared towards ensuring that “everyone has access to resources, opportunities and essentials,” necessary for an adequate standard of living are not given due recognition and protection.²⁵

In addition, judges of the High Court and Supreme Court remain reluctant to evoke international human rights law to protect these rights.

1.1 Purpose of the study

The purpose of the study is to critically analyze the extent to which Zambia is complying with its international human rights law obligations to protect and realize the socio-economic rights of prisoners.

1.2 Background to the study

Since independence, the government has done little to improve the state of prisons in the country. Accordingly, the socio-economic conditions under which convicted persons and remandees serve their sentences and await trial are generally conditions that are unfit for human habitation.

Year after year, various organizations²⁶ visit prisons and compile reports with recommendations geared towards improving the state of prisons around the

²³ Cap 97 of the Laws of Zambia.

²⁴ See s146 of Cap 97 of the Laws of Zambia.

²⁵ See Mwale S. *Zambia's economic, social and cultural rights, why should they be in the new constitution?* p1. <http://www.jctr.org.zm/downloads/escreport.pdf> (accessed 12 June 2011).

²⁶ Including but not limited to: The Zambian Human Rights Commission, the Human Rights Watch, the Legal Resource Foundation, the Prisons Fellowship of Zambia and the Young Women's Christian Association.

country. Nevertheless, their findings and recommendations appear to fall on deaf ears. One such organization is the Zambian Human Rights Commission.²⁷

To date, the Human Rights Commission has conducted prison visits in all the prisons in the Lusaka Province (2004), the Central Province (2005), the Southern Province (2006), the North Western Province (2008) and the Northern Province (2009). However, because of poor funding, the Commission is unable to undertake yearly inspections of the same prisons. Instead, the Commission has opted to each year undertake an inspection of all detention facilities and police posts in a particular province.

Below is a summary of the gross human rights violations identified and highlighted by the Zambian Human Rights Commission, the Human Rights Watch²⁸ and Justice Mulanda.²⁹

²⁷ The Zambian Human Rights Commission is established by Article 125 of Cap 1 of the Laws of Zambia. According to Section 9 of the Human Rights Commission Act Cap 48 of the Laws of Zambia, the Human Rights Commission is obliged to “visit prisons and places of detention or related facilities with a view of assessing and inspecting conditions of the persons held in such places and make recommendations to redress existing problems.”

²⁸ Between September 2009 and February 2010, the Human Rights Watch in association with the Prisons Care and Counselling Association (PRISCCA) and AIDS and Rights Alliance for Southern Africa (ARASA), interviewed prisoners, former prisoners, prison officers and conducted facility tours at six prisons throughout the central parts of Zambia. The persons interviewed, provided information on prisoner’s incarceration history, medical care, and HIV and TB testing and treatment. Moreover, representatives from government, international agencies and donors, and non-governmental organizations were also interviewed.

²⁹ Justice MC Mulanda is a Judge of the High Court of Zambia. According to s23 of Cap 97 of the Laws of Zambia, “any Justice of Appeal or Judge may visit and inspect any prison at any time, and, while so doing, may inquire into any complaint or request made by a prisoner.” Moreover, in terms of s 127 “on completion of each visit, a visiting justice shall enter in a book to be kept for such purpose such remarks, suggestions or recommendations for the information of the Commissioner as he may deem fit.”

(a) Inhabitable and dilapidated facilities

In Zambia, the majority of prisons were built before independence. Consequently, they are old, dilapidated and unfit for human habitation.³⁰ Today, in the rainy season, many prisoners are forced to *inter-alia* tolerate leakages in cells, which results in them flocking together to avoid being soaked. Furthermore, the use of pit latrines with no provision for privacy and the absence of proper kitchen facilities³¹ is a common feature in many prisons.

(b) Congestion in prisons

Most of Zambia's prisons are extremely congested.³² A report by the Human Rights Watch indicates that in 2009, Zambian prisons accommodated 15 300 prisoners despite the fact that the prisons were built to accommodate a total of 5 500 prisoners.³³ The overcrowding in prisons has resulted in degrading living conditions. Among such conditions is the fact that a considerable number of

In June 2011, Justice Mulanda visited and compiled reports of her visits to Mufulira State Prison in the Copperbelt Province and Isoka State Prison in the Northern Province.

³⁰ For example in the Lusaka province, Lusaka Central (or Chimbokaila) Prison was built in 1924. Other prisons in the province include: Kamwala Remand Prison and Mwembeshi Open Air Prison, constructed in 1958 and 1974 respectively. Moreover, in the Central province, Mpima Remand Prison, Kalonga State Prison and Mukobeko Maximum Security Prison were constructed in 1958, 1964 and 1961 respectively. Furthermore, in the Southern province, Choma State Prison was built in 1952 and Namwala State Prison was constructed in 1968.

³¹ In prisons in the more rural areas of the country, the colonial prisons generally have an outside kitchen, which makes it difficult to prepare food during the rainy season as the kitchen is in an open space.

³² See Human Rights Commission. *Annual Report*. 2006 p 14; Human Rights Commission. *Annual Report* 2008. p 10-11 and Human Rights Commission *Annual Report*. 2009. p 15.

³³ Human Rights Watch Report. *Unjust and Unhealthy: HIV, TB and Abuse in Zambian Prisons*. p 15 (accessed 10 June 2011).

http://www2.ohchr.org/english/bodies/crc/docs/Discussion2011_submissions/HumanRightsWatch/UnjustandUnhealthyFINAL.pdf (accessed 15 August 2011).

prisoners sleep on the bare floor in a sitting position, with no mattress or blanket.³⁴

What is more appalling, is the fact that in a number of prisons, juveniles share the same cells with adult convicted prisoners and adult prisoners on remand.³⁵ In the same manner, mentally ill persons and women with infants are not kept separately from other inmates.

The same applies to tuberculosis patients, who are not kept separately from the rest of the inmates, therefore, creating conditions for the easy transmission of the disease between inmates.³⁶

(c) **Poor sanitation**

Generally, the sanitation facilities in many prisons are poor, with no provision for privacy.³⁷ Moreover, for many prisoners, clean running water is a scarce resource resulting in prisoners making use of contaminated water to drink, bath and wash their uniforms.³⁸ Furthermore, the absence of clean water coupled

³⁴ See Mungole R. *Crime and Criminal Justice: Zambia Prisons Service*. Human Security Initiative (AHS1) 2. <http://www.africanreview.org/events/zamprisons.pdf> (accessed 12 August 2011). p 96-97 and Human Rights Commission. *Prison and Police Cells Inspection Report Lusaka Province*. 2004. p 2.

³⁵ See Human Rights Commission. *Prison and Police Cells Inspection Report North-Western Province*. 2008. p 9. This practice is contrary to section 60 of the Prisons Act, which requires young prisoners to be kept separately from adults and other classes of prisoners.

³⁶ See Human Rights Commission. *Prison and Police Cells Inspection Report Central Province*. 2005. p 2 and Human Rights Watch Report. p 20-22.

³⁷ See *Prison and Police Cells Inspection Report Lusaka Province* p 2; *Prison and Police Cells Inspection Report Central Province* p 1; *Prison and Police Cells Inspection Report North Western Province* p 11; Human Rights Commission *Annual Report*. 2006. p 15 and Human Rights Commission *Annual Report*. 2009. p 15.

³⁸ Some of the reasons cited for the absence of water in some prisons is the fact that the water supply had been disconnected due to the failure of the Prison Service to pay the outstanding water bills. This was the case in Kasempa and Zambezi State Prisons in the North-Western Province.

with the absence of bath soap and washing detergent has resulted in prisoners taking fewer baths and consequently contracting skin ailments.³⁹

(d) Inadequate food and absence of cutlery

It is common knowledge that in the majority of prisons, inmates do not have adequate food both in quantity and quality. Numerous reports have confirmed that inmates generally receive one late meal per day consisting of nshima⁴⁰ and kapenta⁴¹ or beans.⁴²

As if this in itself is not appalling, no special dietary provisions are made for juveniles, female prisoners with children and persons on medication such as anti-retroviral treatment and tuberculosis medication.

Furthermore, many prisons lack cooking utensils, plates and spoons, forcing prisoners to make their own.⁴³

(e) Absence of immediate medical attention

Very few prison facilities can claim to have a resident doctor that provides immediate medical attention to prisoners. The reality for many prisoners is that they have to make use of a doctor at the nearest clinic, of which such clinic may be kilometers away from the prison.

³⁹ See Human Rights Annual Report. 2006. p 15 and Human Rights Annual Report. 2008. p 14-16.

⁴⁰ A hard porridge made out of maize meal.

⁴¹ Very small dried fish.

⁴² During the inspection of the Mufulira State Prison in the Copperbelt Province, it came to the attention of Justice Mulanda that prisoners are given one meal per day which is prepared without cooking oil and salt. Moreover, the report of Mungole R. p 97-98, also confirms this horrendous situation.

⁴³ See Prison and Police Cells Inspection Report North Western Province p 9-10; Human Rights Commission Annual Report.2008. p 13-14 and Prison and Police Cells Inspection Report Central Province p 2.

Considering that transport in the Prison Service is a huge problem, it is extremely difficult for prisoners to receive immediate medical attention.

To make matters worse, research shows that the emergency medical kits in the possession of prison officials are generally poorly stocked, even lacking the most basic medication.⁴⁴

Surely, the above painted picture of the socio-economic conditions in Zambian prisons should be an indication that the socio-economic state under which prisoners are incarcerated cannot be in harmony with the international and regional minimum human rights norms pertaining to the protection and realization of the socio-economic rights of prisoners.

1.3 Statement of problem

Zambian prisoners are deprived of some of the most basic of rights, by the state which hosts them. In Zambia, the dignity of prisoners is constantly being violated due to the appalling socio-economic state of numerous prisons around the country. The absence of necessities such as running water, minimal medical care, kitchen cutlery, bathing and washing soap/detergent and not to mention, the one nutrition lacking meal a day, are among the harsh conditions under which convicted prisoners and remandees are forced survive under.

1.4 Research question

Given the national and international legal landscape, why are Zambian prisoners so inhumanely treated against their basic rights in law?

⁴⁴ In 2003, the Zambia Human Rights Commission reported that “health and medical services were almost non-existent or extremely poor in the majority of the prisons. Prison clinics have either closed down due to lack of personnel, drugs and other basic essentials...or they exist without any personnel or essential drugs.” Zambia Human Rights Commission. *Annual Report*. 2003. p.15. This state of affairs was confirmed in 2010 by the Human Rights Watch. See Human Rights Watch Report. p16.

1.5 Methodology

The study involved desk research and limited field work in Zambia. Accordingly, international and regional human rights law instruments, national laws, reports of the United Nations, reports of the African Union and reports of Non-governmental organizations were gathered and critically analyzed. Moreover, informal discussions with prison officials and persons working in NGO's were held.

1.6 Literature review

Broadly sanctioned by the constitution, socio-economic rights in Zambia have been undermined. As to the socio-economic rights of prisoners, the Prisons Act⁴⁵ and other general law may be used to find a legal basis for the realization of these rights.

A dissection of the relevant provisions of the Prisons Act and Prisons Rules⁴⁶ indicates that the Act and Rules merely purport to acknowledge and protect socio-economic rights.

This standpoint, stems from the fact that neither the Act nor the Rules expressly state that every prisoner possesses certain socio-economic entitlements. Instead, the provisions of the Act and Rules indirectly take cognizance of the socio-economic entitlements of prisoners when addressing the duties of prison officers and medical officers. Therefore, in essence, the manner in which the rights in question are recognized in the Act and Rules does not differ from that in the constitution.

In view of the above, the constitutions failure to expressly recognize socio-economic rights as justiciable rights has had an adverse effect on legislation pertaining to prisons and prisoners.

⁴⁵ Cap 97 of the Laws of Zambia 1995.

⁴⁶ Ibid.

In 2004, Simson Mwale⁴⁷ argued for the inclusion of justiciable socio-economic rights in the new constitution.⁴⁸ Nevertheless, this was not realized because in 2010, parliament rejected the Draft Constitution Amendment Bill,⁴⁹ which proposed for the inclusion of justiciable socio-economic rights.⁵⁰

Accordingly, in Zambia socio-economic rights remain unenforceable “Directive Principles of State Policy.” This, in itself may explain the scarcity of Zambian literature in the context of the socio-economic rights of prisoners. Therefore, it is not surprising that the vast majority of literature in this regard, emanates from internal and external non-governmental organizations⁵¹ and the Human Rights Commission.

In its “Prison and Police Cells Inspection Reports” of 2004, 2005 and 2008, the Zambian Human Rights Commission reported numerous injustices in relation to the socio-economic rights of prisoners.

⁴⁷ A consultant for the Jesuit Centre for Theological Reflection.

⁴⁸ Mwale S. 2004. *Zambia’s economic, social and cultural rights, why should they be in the new constitution?* Research report, Jesuit Centre for Theological Reflection.

<http://www.jctr.org.zm/downloads/escreport.pdf> (accessed 12 June 2011).

⁴⁹ National Constitutional Conference Act 19 of 2007.

http://www.ncczambia.org/media/the_national_constitutional_conference_act_20071.pdf (accessed 12 August 2011).

⁵⁰The Post Online. *Rejecting socio-economic rights from constitution is worst insult.*

http://postzambia.com/post-read_article.php?articleId=9092 (accessed 29 February 2011).

⁵¹ The Prisons Fellowship of Zambia, the Young Women’s Christian Association and the Legal Resources foundation are among the prominent organization which undertake visits to prisons and compile reports with recommendations. Nonetheless, more often than not, the reports are not available to the public. A consultation with Bishop Enocent Silwamba, the Executive Director of Prison Fellowship Zambia in Ndola, Zambia revealed that the reports compiled by the organization are not available to the public at large, but are presented to the relevant government authorities. (Informal conversation held on 19 July 2011 at the Prisons Fellowship office in Ndola, Zambia).

The Commission, which is a statutory body established by the Zambian Constitution⁵² and regulated by the Human Rights Commission Act,⁵³ each year assess the socio-economic conditions in prisons around the country.

In this regard, reports of the Commission indicate that the majority of places of detention in Zambia are overcrowded, have sanitation facilities that disregard privacy, are institutions where prisoners are provided with a poor diet in both quality and quantity, are institutions where prisoners are deprived of their right to have access to the most basic of medication and healthcare and are institutions where dignity is almost non-existent.

The aforementioned findings have been cemented in the Commissions Annual Reports of 2006, 2008 and 2009⁵⁴ and other reports including but not limited to those of: The Human Rights Watch,⁵⁵ Justice M.C Mulanda⁵⁶ and Mungole R.⁵⁷

In 2010, the Human Rights Watch produced a report on the right to health of prisoners detained in Zambian prisoners.⁵⁸ The study conducted between

⁵² See Article 125 of Cap 1 of the Laws of Zambia.

⁵³ Cap 48 of the Laws of Zambia.

⁵⁴ See Human Rights Commission. *Annual Report (2006)*; Human Rights Commission. *Annual Report (2008)* and Human Rights Commission. *Annual Report (2009)*.

⁵⁵ Human Rights Watch Report. *Unjust and Unhealthy: HIV, TB and Abuse in Zambian Prisons*. http://www2.ohchr.org/english/bodies/crc/docs/Discussion2011_submissions/HumanRightsWatch/UnjustandUnhealthyFINAL.pdf (accessed 15 August 2011).

⁵⁶ See fn 11 above.

⁵⁷ Head of Law at the National Institute of Public Administration and an alumna of International Humanitarian Law from the Centre for Human Rights at the University of Pretoria in South Africa.

⁵⁸ Between September 2009 and February 2010, Human Rights Watch in association with the Prisons Care and Counselling Association (PRISCCA) and the AIDS and Rights Alliance for Southern Africa (ARASA) interviewed prisoners, former prisoners, prison officers and conducted facility tours at six prisons throughout the central parts of Zambia. The persons interviewed, provided information on prisoner's incarceration history, medical care, and HIV and TB testing and treatment. Moreover, representatives from government, international agencies and donors, and non-governmental organizations (NGOs) were also interviewed.

September 2009 and February 2010, which involved the interviewing of prisoners, former prisoners and prison officers, reveals that Zambian Prisons are places where infectious diseases such as tuberculosis manifest and where the spread of HIV is at its peak.

To make matters worse, prison facilities do not have a clinic to treat patients, nor do they have emergency kits with sufficient medication.⁵⁹

Moreover, in June 2011, Justice MC Mulanda visited the Mufulira State Prison in the Copperbelt Province and the Isoka State Prison in the Northern Province and compiled reports on both visits.

In the reports, the judge observes that prisoners are only provided with one nutritional lacking meal a day consisting of nshima and kapenta or beans. To add on, in the Mufulira State Prison Report, the judge notes that not only do prisoners share a very thin blanket as their only bedding, but they also wear their own clothing due to the unavailability of uniforms.

Additionally, in its *Concluding Observations and Recommendations* on the State Party Report produced by Zambia, the Committee on Economic, Social and Cultural Rights (C ESCR),⁶⁰ in 2005 expressed concerns about “the living conditions of prisoners and detainees, especially with regard to access to healthcare facilities, adequate food and safe drinking water.”⁶¹

Furthermore, Zambia has in reports to the Economic and Social Council,⁶² the Human Rights Committee (HRC)⁶³ and the African Commission on Human and

⁵⁹ Human Rights Watch Report. p16.

⁶⁰ Zambia, U.N. Doc. E/C.12/1/Add.106 (2005).

⁶¹ See observation 28 under the title “Principle subjects of concern”.

⁶² See fn 60 above.

⁶³ CCPR/C/63/Add.3.http://www.bayefsky.com/reports/zambia_ccpr_c_63_add.3_1995.php

Peoples' Rights,⁶⁴ admitted that not all principles of international human rights law have been domesticated in national legislation.

If the findings of the reports briefly discussed above, are not an indication of the urgent need for legal reform and the rehabilitation of prisons, then one may only wonder what is.

Nevertheless, on a more positive note, although Mungolo R⁶⁵ confirms the findings in the abovementioned reports, he highlights the new developments embarked on by the Prison Service to improve the current conditions. Among the projects implemented, is the renovation of old and dilapidated prisons.

To finish, while some scholars may argue that the Prison Service has acknowledged its flaws and is taking proactive measures to ensure that the treatment of prisoners and prison conditions meet international minimum human rights law standards, the fact of the matter is that at present, the socio-economic rights of prisoners are being violated.

The government is simply not doing enough to protect and realize the socio-economic rights of prisoners.

Concluding Observations of the Human Rights Committee, Zambia, UN Doc CCPR/C/79/Add.62(1996).

⁶³ (CCPR/C/ZMB/3) at its 2454th and 2455th meetings, held on 9 and 10 July 2007. (CCPR/C/SR.2454 and 2455). At its 2471st meeting, held on 20 July 2007 (CCPR/C/SR.2471), Submitted in accordance with the International Covenant on Civil and Political Rights.

⁶⁴ Government Republic of *Zambia Initial Report*: African Charter on Human and Peoples' Rights. Submitted in accordance with Art 62 of the African Charter on Human and Peoples' Rights.

⁶⁵ *Crime and Criminal Justice: Zambia Prisons Service*. Human Security Initiative (AHS1) 2. <http://www.africanreview.org/events/zamprisons.pdf> (accessed 12 August 2011).

CHAPTER 2

THE LAWS OF ZAMBIA

In Zambia, the main pieces of legislation that govern prisons are the: Prisons Act,⁶⁶ the Prison Rules⁶⁷ and the Prison Standing Orders.⁶⁸ Nevertheless, for the purposes of this paper only the Act and the Rules will be discussed. Furthermore, over and above a discussion on the Prisons Act and Prisons Rules, the relevant provisions of the Zambian Constitution,⁶⁹ will be analyzed.

The purpose of the chapter is to determine whether the laws of Zambia promote the protection, realization and enforcement of the socio-economic rights of prisoners in the country.

2.1 Prisons Act and Prisons Rules

In relation to the Zambian Prison Service⁷⁰ and as briefly stated in the introduction above, the Prisons Act, Prisons Rules and the Prison Standing Orders are the main pieces of legislation pertaining to prisons.

The purpose of the Act is derived from the long title and such purpose is to “provide for the establishment of prisons, for a prison service, for the discipline of prison officers, for the management and control of prisons and prisoners lodged therein.” Furthermore, the Act aims to provide for “youth corrective training

⁶⁶ See s 146 of Cap 97 of the Laws of Zambia.

⁶⁷ See s 146 of Cap 97 of the Law of Zambia: “Rules, Repeals and Savings”.

⁶⁸ Set out in 1968.

⁶⁹ Act 18 of 1996.

⁷⁰ A body responsible for the management of all detention facilities in the country and established under Art 106 of Chapter 1 of the Laws of Zambia.

centres and extra-mural penal employment, compulsory after care orders and matters incidental to or connected with the foregoing.”⁷¹

A critical analysis of the provisions of the principal Act and subsidiary legislation reveals that although socio-economic rights may be indirectly addressed in certain provisions, the provisions address these “rights” as prison rules and duties of prison officers rather than as rights of prisoners.

Below are some of the many criticisms that may be raised against the Act and Rules in relation to the legislature’s failure to expressly “declare” the socio-economic rights of prisoners.

Firstly, it is notable that neither the Act nor the Rules contain provisions expressly stating that upon being confined to a prison, each prisoner shall be entitled to his or her own bedding and a pair or more of uniform(s). The closest provisions in this regard are those expressed in Rule 66 and Rule 104.

On the one hand, Rule 66 obliges the chief officer to ensure that prisoners’ clothing and bedding are “in good order and repair”. On the other hand, Rule 104 requires every prisoner to be dressed in “appropriate prison clothing” with the exception of civil and unconvinced prisoners.

However, reports indicate that there is hardly a time when each prisoner has his or her own sufficient beddings, as most prisoners are forced to share a very thin “blanket” or do with none.⁷² Moreover, in many prisons, prisoners are left with no

⁷¹ See the long title to Cap 97 of the Laws of Zambia and Art 107 of Cap 1 where the constitutional functions of the Prison Service are established. An observation worth noting is the fact that in the long title, there is no mention of the right of prisoners. It is from the long title that one may get the impression that the Act is not at all concerned about the rights of prisoners as such, but is focused on the management of the prisons by the various role-players mentioned therein.

⁷² See p 4 above at par (b).

option but to wear their own clothing due to the limited number of available worn out uniforms.

Secondly, although the Prison Rules⁷³ contain a provision holding prison authorities “responsible for ensuring that every article of food supplied to the prisoners is of sound and good quality” and that “rations are issued in strict accordance with the prescribed scales of diet,” the rules omit an express provision requiring that prisoners be given three meals a day.⁷⁴

It is therefore not surprising that despite the fact that the Prisons Rations lists foodstuffs ranging from fresh fish to fresh vegetables, rice to potatoes and bread to cocoa, the reality for many prisoners is that they have to be satisfied with one meal per day consisting of nshima and kapenta or beans. As if this in itself is not appalling, the majority of meals in prisons hardly consist of vegetables even in the smallest form such as tomatoes being added to a meal. Instead, meals are often prepared as plain as possible, without cooking oil or salt.⁷⁵

Furthermore, neither the Act nor the Rules contain provisions that make it possible for special diets to be administered to persons on medication such as anti-retroviral medication or tuberculosis medication.

Therefore, one can hold that the current provisions of Rule 17(1) requiring the officer in charge to visit prisoners during their meal times to listen to any complaints and take immediate action where necessary, have no effect in practice because if the rule was being complied with, the violation currently

⁷³ See Rule 65.

⁷⁴ Consisting of the different food groups listed in the First Schedule of the Rules (“Prisons Rations”).

⁷⁵ See p 5 at par (d).

taking place would be minimal or even non-existent especially where the necessary measures have been taken.⁷⁶

Thirdly, as to the aspect of the right to health and healthcare, the provisions of sections 16-23 of the Prisons Act and Rules 24(1) and 40-45 of the Prison Rules, establish minimum standards for medical care. Embodied in the aforementioned provisions is *inter-alia* an obligation on the minister to appoint a medical officer to “take care of the health of prisoners and visit them daily where applicable” and an obligation on the medical officer to at least once a month “inspect every part of the prison, paying special attention to the sanitary state of the prison, the health of the prisoners, and the adequacy and proper cooking of the diets and review the weights of the prisoners.”⁷⁷

Moreover, Rule 24(1) of the Prison Rules not only establishes minimum standards for medical care, but the Rule also requires that the officer in charge of each prison maintain a properly secured hospital, clinic or sick bay within the prison.

Nevertheless, in spite of the existence of provisions protecting the right to health and healthcare, the reality is that currently most prisoners do not have access to a medical doctor who can undertake the services mentioned in the Rules.

Fourthly, although the provisions of section 60 of the Act dictate that the different classes of convicted and unconvicted prisoners⁷⁸ be kept apart, in practice it is not the case as juveniles are kept together with convicted adults and unconvicted

⁷⁶ One would assume that the necessary measures include seeking monetary assistance from internal and external sources to ensure that prisoners are well fed.

⁷⁷ See Rule 47.

⁷⁸ The Act identifies the following convicted and unconvicted categories of prisoners: Young prisoners; adults; first offenders; prisoners with previous convictions; prisoners suspected or certified as being of unsound mind and such other classes as the Commissioner may determine.

prisoners are also sometimes kept in the same cell as convicted prisoners.⁷⁹ Moreover, mentally ill prisoners are kept in the same cells as mentally sound prisoners.

Lastly, the provisions of the Act and Rules are silent on the education of adult prisoners. It is apparent that the Rules address the right to education only in the context of persons admitted in a Youth Corrective Centre in terms of Rule 221. The content of this right is elaborated on in Rule 227⁸⁰ and 229.⁸¹

However, even if the Rules contain provisions pertaining to the education of juveniles, research shows that not every centre has a library, and those with one, lack adequate, updated educational material.⁸²

Therefore, to gain a better insight into why the loop-holes in the Act and Rules exist, the relevant provisions of the constitution are discussed below.

2.2 Constitution of the Republic of Zambia

Zambia is a multi-party constitutional democracy, with a written constitution dating back to 1964. The constitution is the supreme law of the land.

Nonetheless, for many years the constitution has been the subject of numerous criticisms. In 2010, parliament rejected the Draft Constitution Amendment Bill which *inter-alia* proposes for the inclusion of justiciable socio-economic rights.⁸³

⁷⁹ For example in 2007, the Human Rights Commission in its report *The Welfare of Children in Prisons, Other Detention Centres and Orphanages Northern Province*, p 31, reported that of the 7 prisons in the Northern Province, only one prison had separate cells for child and adult offenders.

⁸⁰ According to Rule 227 “arrangements shall be made for the part-time education of inmates either within the normal working hours or outside such hours.”

⁸¹ Rule 229 guarantees the provision of library books accessible to all inmates in every centre, where practical.

⁸² Human Rights Commission. *The Welfare of Children in Prisons, Other Detention Centres and Orphanages. Northern Province* 2009.

⁸³ See The Post Online. <http://maravi.blogspot.com/2010/05/rejecting-socioeconomic-rights-from.html> (accessed 29 February 2011) and National Constitutional Conference (Act 19 of 2007).

Consequently, socio-economic rights remain unenforceable “Directive Principles of State Policy.”

Therefore, a criticism relevant to the subject at hand is the fact that the current constitution does not expressly recognize and protect socio-economic rights as justiciable rights. However, civil and political rights are given due recognition and are justiciable in a court of law.⁸⁴

The inferior-status allocated to socio-economic rights, in relation to civil and political rights is echoed throughout the provisions of Articles 110-112 of the constitution.

Firstly, Article 112 emphasizes that the directives referred to in the Article are mere “Principles of State Policy.”⁸⁵

Secondly, Article 110 stresses that “Directive Principles of State Policy” merely serve as guidelines for the Executive, Legislature and Judiciary in the “development of national policies, implementation of national policies, making and enactment of laws and application of the constitution and any other law.” The fact that Article 110 refers to socio-economic rights as “guidelines” can serve as

⁸⁴ Organisation Mondiale Contre La Torture. 2001. *Zambia: violations of economic, social and cultural rights, violence and the protection against torture.*

<http://www.omct.org/files/2002/06/1142/zambiaescr.pdf> (accessed 20 October 2011); Mwale S, p1 and http://www.ncczambia.org/media/the_national_constitutional_conference_act_20071.pdf (accessed 15 September 2011).

⁸⁵ The Article with the title “Directive Principles of State Policy” in 112 (b)-(f) places an obligation on the government to endeavour to create and provide amongst other rights: “An economic environment which shall encourage individual initiative and self reliance among the people and promote private investment; create conditions under which all citizens shall be able to secure adequate means of livelihood and opportunity to obtain employment; provide clean and safe water, adequate medical and health facilities and decent shelter for all persons, and take measures to constantly improve such facilities and amenities; provide equal and adequate educational opportunities in all fields and at all levels for all and provide a clean and healthy environment for all.”

confirmation of the inferior status given to socio-economic rights by the legislature.

Lastly, the provisions of Article 111 affirm that socio-economic rights are not justiciable “by themselves, despite being referred to as rights in certain instances...”⁸⁶

Article 111, therefore serves as proof of the assumption that the state currently adopts the ideology of Western states at the time when the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were adopted, in 1966.

At the time that the two Covenants were adopted, Western states argued that socio-economic rights are expensive rights that cannot be easily realized and that are unsuitable for judicial enforcement.⁸⁷

Therefore, the notion that socio-economic rights are rights, which require the state to act positively to realize them, may be hindering the acceptance of socio-economic rights as justiciable.

Nevertheless, this ideology is not justification for the denial of socio-economic rights, considering that the state has international and regional human rights law obligations that it must abide by.

Consequently, the *status quo* has created a situation whereby a prisoner cannot rely on the constitution to allege that his or her socio-economic rights have been violated, nor can he or she seek relief from a national court of law. In addition, the relevant authorities that wish to have the socio-economic rights of prisoners

⁸⁶ The Article with the title “Directives not to be justiciable” is self explanatory and confirms that socio-economic rights unlike civil and political rights may not be the subject of litigation “in any court, tribunal, administrative institution or entity.”

⁸⁷ Community Law Centre. *Protecting socio-economic rights internationally*. p 95.
<http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights/2nd-ed-of-resource-book/chapter%203.pdf/> (accessed 12 October 2011).

realized, must evoke the relevant provisions in applicable general law, as the basis for the realization socio-economic rights.⁸⁸

However, this state of affairs could soon change because in October 2011, Zambia's new President Michael Sata announced plans to change the new constitution within 90 days. Although the exact details of the upcoming change have not been revealed,⁸⁹ one can only hope that justiciable socio-economic rights of everyone including prisoners will be included in the new constitution.

In conclusion, this chapter has proved that the Prisons Act and Prison Rules, do not adopt a human rights law approach. The fact that rights such as the right to have access to bedding, food, healthcare and satisfactory sanitation facilities are dealt with as duties of the officer in charge, prison officer or medical officer and not as entitlements of prisoners, is indicative of a non-human rights law approach.

Therefore, it can be argued that the basis for the realization of the socio-economic rights of prisoners is left to other general law⁹⁰ and policies that do not necessarily address the specific issues of prisoners or include the Prison Service as a stakeholder.⁹¹

⁸⁸ Applicable general law in the context of socio-economic rights may include but is not limited to: the Prisons Act, the Public Health Act (Cap 295 of the Laws of Zambia), the National Health Services Act (Cap 315 of the Laws of Zambia), and the National Food and Nutrition Commission Act (Cap 308 of the Laws of Zambia).

⁸⁹ *Zambia's Sata wants new constitution in 90 days*. <http://www.polity.org.za/article/zambias-sata-wants-new-constitution-in-90-days> (accessed 14/10/2011).

⁹⁰ Including but not limited to: The Public Health Act, the National Health Services Act and the National Food and Nutrition Commission Act.

⁹¹ For example, the National Health Strategic Plan of 2006-2010, whose purpose is to devise a strategy on how to achieve national health priorities by giving due regard to various stakeholders, does not include prisons as stakeholder to be consulted. See Republic of Zambia, Ministry of Health. National Health Strategic Plan 2006-2010. November 2005.

Moreover, the chapter has also illustrated that the constitutions recognition of socio-economic rights as mere “Directive Principles of State Policy,” has had a direct influence on the provisions of the Prisons Act and Prisons. Consequently, one can allege that the Act and Prisons Rules are no better in recognizing and promoting the socio-economic rights of prisoners than the constitution.

Nonetheless, the fact that the abovementioned three pieces of legislation do not expressly recognize the rights in question, does not mean that Zambia is relieved of its international and regional human rights law obligations as a member state of the United Nations and African Union.

CHAPTER 3

SOCIO-ECONOMIC RIGHTS OF PRISONERS UNDER INTERNATIONAL LAW

International law has legislated on the rights of prisoners, under human rights law, both regionally and globally.

Although an active participant in negotiating and adopting international human rights treaties, it is interesting to note that the Zambian constitution is silent on the status of international law. Consequently, the common law governs this aspect.

According to the common law, international instruments are not self-executing and therefore require legislative implementation if they are to be effective as law.⁹² In other words, “treaties must either be enacted or transformed into national law before they form part of Zambian law.”⁹³ The responsibility to domesticate international law vests in the Ministry of Justice.

Therefore, in light of the fact that Zambia is a member state of both the United Nations and the African Union and considering the fact that Zambia has ratified or acceded to the main instruments protecting socio-economic rights,⁹⁴ this chapter is aimed at determining whether Zambia is complying with the agreed international minimum standards in relation to the socio-economic rights of prisoners.

⁹² See *Zambia Initial Report: African Charter on Human and Peoples’ Rights*. p 50.

⁹³ See Killander (ed). *International law and domestic human rights litigation in Africa*. p 71. Prof M Hansungule, a Professor in human rights at the Centre for Human Rights at the University of Pretoria, writes a chapter with the title: *Domestication of international human rights law in Zambia*.

⁹⁴ Which require state parties to incorporate the principles contained therein in national legislation.

The term “compliance”, in this context, refers to the efforts made by the state to domesticate international law and the actual treatment of persons in places of detention. Therefore, reference will be made to the applicable provisions in both hard and soft international human rights law instruments.

3.1 Socio-economic rights of prisoners at international level

One of the major consequences of Zambia’s membership to the United Nations, is that the state is obliged to subscribe to the rules and principles of instruments of the United Nations.

In relation to the socio-economic rights of prisoners, Zambia is obliged to abide by *inter-alia* the non-binding rules and principles in the Universal Declaration of Human Rights (UDHR), the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR), the Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment and the Basic Principles for the Treatment of Prisoners.

Moreover, because Zambia has ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), it is expected of the state to incorporate the principles in these instruments in national legislation.

Below is a discussion of the some of the provisions of the abovementioned instruments, relevant to the socio-economic rights of prisoners and the extent to which Zambia has complied with the provisions.

(a) Universal Declaration of Human Rights

In 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights. Although not binding, the Declaration for the first time

substantively declared the rights and freedoms referred to in the United Nations Charter of 1945.⁹⁵

In relation to socio-economic rights, the Declaration entrenches these rights in Articles 22-27. Included are the right to social security,⁹⁶ the right to work,⁹⁷ the right to leisure,⁹⁸ the right to an adequate standard of living and health,⁹⁹ the right to education¹⁰⁰ and the right to culture.¹⁰¹

Moreover, an important feature of the Declaration which is highly relevant to the subject at hand is the emphasis on the equal status of every human being. Articles 1 and 2 stress that “all human beings are born free and equal in dignity and rights” and that everyone is entitled to all the rights and freedoms in the Declaration “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁰²

A human rights based interpretation of the aforementioned provisions would require an interpretation expressing the view that - because persons in detention facilities are human beings, they like every other person have certain inherent

⁹⁵According to some scholars the Declaration is the “first Declaration of moral and political principles that could make a *prima facie* plausible claim to universality.” See Freeman M. *Human Rights*. p 42.

⁹⁶ See Art 22.

⁹⁷ See Art 23.

⁹⁸ See Art 24.

⁹⁹ See Art 25.

¹⁰⁰ See Art 26.

¹⁰¹ See Art 27.

¹⁰² This human rights theory is shared by Professor Jack Donnely who perceives human rights as “the rights one has simply because one is a human” and which are held equally and inalienably by all human beings. See Donnely J. *International Human Rights* p 19.

human rights and freedoms, that may not be unnecessarily limited, simply because they are in a place of detention.

Therefore, keeping in line with the provisions of the Declaration, the socio-economic rights of prisoners, while in a detention facility *inter-alia* include the right to have an adequate standard of living, the right to health and the right to education.

Interestingly, one can find traces of the domestication of the aforementioned principles of equality and non-discrimination in the Zambian Constitution. For instance, the bill of rights in Article 23 recognises the principle of non-discrimination¹⁰³ as a fundamental right. Nevertheless, a downside to the principle embodied in Article 23 is the fact that the protection afforded in the aforementioned Article falls short of that afforded by international human rights law. This, is because Article 23 places limitations on personal law, and contains clauses which exclude aliens from protection.¹⁰⁴

(b) International Covenant on Economic, Social and Cultural Rights

Today the ICESCR is the most detailed instrument of the United Nations which protects and promotes economic, social and cultural rights in the United Nations human rights system. The legally binding Covenant recognizes the right to social security,¹⁰⁵ the right of everyone to an adequate standard of living,¹⁰⁶ the right to health and healthcare¹⁰⁷ and the right to education.¹⁰⁸

¹⁰³ See Art 23 of Cap 1 of the Laws of Zambia.

¹⁰⁴ See Art 23(4).

¹⁰⁵ See Art 10.

¹⁰⁶ See Art 11.

¹⁰⁷ See Art 12.

¹⁰⁸ See Art 13.

Accordingly, a critical observance of the provisions of Articles 10-13, reveals that the provisions of these Articles are a reiteration of the rights enshrined in Articles 22-27 of the UDHR.

As to Zambia's compliance with the Covenant, reports of various committees and the state itself, have confirmed the states non-compliance with the Covenant.

In 2005, in response to the state party report presented by Zambia, the committee on economic, social and cultural rights (C ESCR),¹⁰⁹ noted that "although the State party has adopted a certain number of laws in the area of economic, social and cultural rights, the Covenant has not yet been fully incorporated in the domestic legal order." Moreover, the Committee expressed concerns about "the living conditions of prisoners and detainees, especially with regard to access to healthcare facilities, adequate food and safe drinking water."¹¹⁰

The same concerns have been raised by the Human Rights Committee (HRC), in relation to the domestication and implementation of the ICCPR.

(c) International Covenant on Civil and Political Rights

Although Zambia ratified the Covenant in 1984, little has been done to domesticate the principles of the Covenant in national law. The state party reports of the Republic of Zambia, as well as the concluding observations of the HRC in relation to state party reports presented by the state, confirm the non-domestication of many of the principles in the instrument.

¹⁰⁹ In the conclusions and recommendations of the state party report produced by Zambia. Zambia, U.N. Doc. E/C.12/1/Add.106 (2005).

¹¹⁰ See observation 28 under the title "Principle subjects of concern".

An important principle in the context of prisoners' rights is that embedded in Article 10 of the Covenant. The Article, which reads "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person," is more often than not ignored by the officers in the Prison Service.

Furthermore, when considering the third periodic report of Zambia,¹¹¹ the HRC in 2007¹¹² noted that the Covenant is not directly applicable in domestic law and therefore expressed concerns that "not all rights provided for in the Covenant have been included in the Constitution and the legislation, or recognized in an appropriate manner therein."

The committee further held that "since the last consideration of the state party's report in 1996, the process of harmonization of domestic law with the Covenant has not been completed" and that "no time frame has been determined for the completion of the process" as determined by Article 2.¹¹³

To add on, in the second periodic reports of state parties, due in 1990,¹¹⁴ Zambia admitted that accused and convicted persons share the same prison facilities due the economic crisis and underfunding of the Prison Service. This situation, which is still common in many prisons as illustrated in chapter one, is indicative of the fact that the state is not fully complying with the provisions of Article 10.

(d) United Nations Minimum Rules and Principles for the Treatment of Prisoners

By virtue of its membership to the United Nations, Zambia must comply with the rules and principles adopted by the General Assembly in relation to the treatment

¹¹¹ (CCPR/C/ZMB/3) at its 2454th and 2455th meetings, held on 9 and 10 July 2007. (CCPR/C/SR.2454 and 2455). At its 2471st meeting, held on 20 July 2007 (CCPR/C/SR.2471),

¹¹² In its "Principal subjects of concern and recommendations".

¹¹³ See United Nations. *Report of the Human Rights Committee. A/62/40* (Vol. I). p 51.

¹¹⁴ CCPR/C/63/Add.3.

of prisoners and persons under any form of detention. Currently the rules and principles in this regard are SMR, the Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment and the Basic Principles for the Treatment of Prisoners.

The rules and principles in the SMR are the most comprehensive guidelines for the treatment of prisoners. Therefore, they are reiterated in the Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment and the Basic Principles for the Treatment of Prisoners. As a result, the section below will focus on the SMR to illustrate some of Zambia's contraventions.

Firstly, the congestion in prisons is contrary to Rule 10 requires "all accommodation provided for the use of prisoners and in particular all sleeping accommodation" to "meet all requirements of health," with due regard being given to the "climatic conditions and particularly to cubic content of air, minimum floor space, lighting and ventilation."

Moreover, the incarceration of adult convicts with juveniles is contrary to Rule 8(d), a rule that dictates that young prisoners be kept separate from adults.

Secondly, the state of the sanitary conditions in many prisons is well below the minimum standards set out in Rule 12 because sanitary installations are not adequate enough to enable "every prisoner to comply with the needs of nature when necessary and in a clean and decent manner."

Furthermore, Zambia is in breach of the provisions of Rule 20(2) because in some prisons there is no running water therefore, drinking water is not "available to every prisoner whenever he needs it."

Thirdly, the fact that many prisoners are forced to sleep in sitting positions on the cold floor due to the insufficient number of mattresses (and not beds) and the fact that some prisoners are forced to share beddings is contrary to the provisions of Rule 19.¹¹⁵

Fourthly, Zambia is in contravention of Rule 20(1), a rule requiring every prisoner to be “provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.” The fact that many prisoners depend on one meal a day which lacks the nutritional value necessary to sustain adequate health and strength is evidence of this violation.¹¹⁶

Finally, Zambia has failed to adhere to the provisions of Rule 22 (1),¹¹⁷ which protect the right to health and access to healthcare of prisoners. The reason for this breach is states failure to ensure that each prison has a clinic, equipped with a doctor to deliver basis medical services. Moreover, the absence of the provision of pre-natal or postnatal care in women’s institutions constitutes a violation of Rule 23(1).¹¹⁸

¹¹⁵ According to this Rule, “every prisoner shall, in accordance with local or national standards, be provided with a separate bed, and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness.”

¹¹⁶ Refer to chapter one.

¹¹⁷ Rule 22(1) reads as follows: “At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organized in close relationship to the general health administration of the community or nation. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.”

¹¹⁸ Rule 23(1) reads as follows: “In women’s institutions there shall be special accommodation for all necessary pre-natal and postnatal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate.”

3.2 Socio-economic rights of prisoners at regional level

Similarly to the United Nations human rights system, in the African region, the African Union has also adopted hard and soft human rights law instruments to *inter-alia* regulate socio-economic rights. The African Charter on Human and Peoples' Rights (ACHPR), the Kampala Declaration on Prison Conditions in Africa and the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhumane or Degrading Treatment or Punishment in Africa (Robben Island Guidelines), are three key instruments in this regard. The instruments are discussed below.

(a) African Charter on Human and Peoples' Rights

In the African region, Zambia was among the first states to ratify the ACHPR in 1987. Although the Charter protects socio-economic rights,¹¹⁹ not all socio-economic rights are addressed. Whereas, the right to property,¹²⁰ the right to work,¹²¹ the right to health and healthcare¹²² and the right to education¹²³ are recognized, it is evident that rights such as the right to food, water, social security and the right of everyone to an adequate standard of living are not included in the Charter.

In relation to the ACHPR, since joining the African Union, Zambia has submitted one State Party report. The report submitted in 2006, was considered by the African Commission on Human and Peoples' Rights in May 2007.¹²⁴ The report

¹¹⁹ The economic, social and cultural rights of individuals and peoples' are found in Art 4, Article 15, Art 16 and Art 17.

¹²⁰ See Art 14.

¹²¹ See Art 15.

¹²² See Art 16.

¹²³ See Art 17.

¹²⁴ *Government Republic of Zambia Initial Report: African Charter on Human and Peoples' Rights*. www.achpr.org/.../state_reports/40_Zambia%20initial%20report_Eng.pdf (accessed 18 September 2011).

inter-alia revealed that although socio-economic rights are included in the constitution, they are merely “Directive Principles of State Policy,” whose realization is dependant on the availability of state resources.¹²⁵

Moreover, the report revealed that there is no legislation that guarantees the right to education as the Education Act¹²⁶ merely provides for the promotion, development and control of schools, educational institutions and services.¹²⁷ Consequently, prisoners are not guaranteed the right to education in any of its forms.

Nevertheless, the report included some positive developments. For instance, the report revealed that there is legislation in place to ensure the enjoyment of life by *inter-alia* ensuring an “adequacy of diets in institutions,” which should in all probability include prisons.¹²⁸

Too add on, the report highlighted the fact that Public Health Act¹²⁹ provides for the prevention and suppression of infectious diseases including but not limited to cholera, tuberculosis, leprosy and small pox.¹³⁰ Therefore, the Act may be used as authority to realize the right to be treated with dignity, as the Act may be used as a basis for separating prisoners with infectious diseases from the rest of the prisoners.

¹²⁵ Furthermore, the “Directive Principles of State Policy are not enforceable in a court of law. *Government Republic of Zambia Initial Report*. p 35-36.

¹²⁶ Cap 34 of the Laws of Zambia.

¹²⁷ *Government Republic of Zambia Initial Report*. p 163.

¹²⁸ See sec 3(2) Schedule of the National Food and Nutrition Commission Act, Cap 308 of the Laws of Zambia.

¹²⁹ Cap 293 of the Laws of Zambia.

¹³⁰ See Art 9(1) of the Act.

An enquiry into whether Zambia is adhering to the principles of the Kampala Declaration on Prison Conditions in Africa will now follow.

(b) Kampala Declaration on Prison Conditions in Africa

In 1996, the African Union adopted the Kampala Declaration on Prison Conditions in Africa and Plan of Action.¹³¹ With respect to “prison conditions”, in summary, the Declaration recommends that prisoners rights be safeguarded at all times, that they retain “all rights not taken away by virtue of being in detention”, that prisoners have living conditions which are compatible with human dignity and that the conditions in which prisoners are held and the prison regulations must be such that they do not “aggravate the suffering already caused by the loss of liberty.”¹³²

Today, although not all Zambian prisons are horrific, the socio-economic conditions in the majority of prisons are not “compatible with human dignity” as is required by the Declaration.¹³³ Consequently, the socio-economic rights of prisoners are neither “safeguarded at all times” nor are protected from being forcefully taken away.

(c) The Robben Island Guidelines¹³⁴

Formally adopted by the African Commission in 2002, the Robben Island Guidelines are an “essential tool for States in fulfilling their national, regional and

¹³¹ Adopted at the Kampala Seminar on Prison Conditions in Africa in September 1996.

¹³² See the Kampala Declaration. p 1.

¹³³ See chapter one where the socio-economic conditions in prisons around the country is highlighted, using the reports of reliable sources.

¹³⁴ African Union. *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhumane or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines)*. <http://www1.umn.edu/humanrts/instree/RobbenIslanGuidelines.pdf> (accessed 7 November 2011).

international obligations to strengthen and implement the prohibition of torture.”¹³⁵

Similar to the United Nations’ SMR, the Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment and the Basic Principles for the Treatment of Prisoners, the Robben Island Guidelines are aimed at promoting and protecting the human rights of detained persons.

As to the conditions of detention, the following can be gathered from the explicit provisions of the guidelines.

Firstly, the guidelines require the treatment of persons deprived of their liberty, to conform to international standards (SMR). Secondly, where conditions do not conform to these standards, states are obliged to take the necessary steps to ensure such conformity. Thirdly, pre-trial detainees are to be separated from convicted persons. Fourthly, juveniles, women and other vulnerable groups are to be kept separately. Fifthly, states are required to take the necessary steps to “reduce over-crowding in places of detention by *inter-alia*, encouraging the use of non-custodial sentences for minor crimes.”¹³⁶

To avoid repetition of what has already been gathered from the analysis of the SMR,¹³⁷ the ACHPR¹³⁸ and the Kampala Declaration,¹³⁹ one can conclude that Zambia is struggling to adhere to the abovementioned guidelines.

¹³⁵ Association for the Prevention of Torture. *Robben Island Guidelines-Introduction*.
http://www.totureprevention.org/index.php?option=com_k2&view=item&id=773:robben-island-guidelines-introduction&Itemid=231&lang=es (accessed 7 November 2011).

¹³⁶ See Robben Island Guidelines 33-37.
<http://www1.umn.edu/humanrts/instree/RobbenIslandGuidelines.pdf> (accessed 7 November 2011).

¹³⁷ Refer to p 27-29 above.

¹³⁸ Refer to p 30-32 above.

¹³⁹ Refer to p 32 above.

Conclusively, this chapter has illustrated that the manner in which prisoners are treated in most Zambian prisons falls short of international and regional minimum standards. Therefore, there is a need for Zambia to amend its laws and practices so that they can reflect the international human rights law as discussed above.

Nevertheless, it is necessary to also give credit to the Zambian government for the efforts that it is making to improve the socio-economic conditions in prisons to bring them in line with international human rights law.

3.3 Efforts made by Zambia to improve socio-economic conditions in prisons

In 2007, in its concluding observations,¹⁴⁰ the HRC expressed concerns about the prison overcrowding and the extremely poor conditions in places of detention. On this aspect, the Committee recommended that appropriate measure be taken to “guarantee the right of detainees to be treated with humanity and dignity, by ensuring that they live in healthy conditions and have adequate access to health care and food.”

In this regard, in 2008, the *Universal Periodic Review Report of the Working Group on the Universal Periodic Review Zambia*,¹⁴¹ revealed that the state was in the process of “improving overcrowding and living conditions in prisons” through its Access to Justice Programme.¹⁴² The report further highlights the action taken by the state to “reduce the length of police custody and of pre-trial prison custody”.¹⁴³

¹⁴⁰ See (CCPR/C/ZMB/3), (CCPR/C/SR.2454 and 2455) and (CCPR/C/SR.2471),

¹⁴¹ A/HRC/8/43. 2 June 2008.

¹⁴² *Zambia*. A/HRC/8/43. 2 June 2008. p 4.

¹⁴³ Under the Access to Justice Programme, consultants were contracted to compile a handbook aimed at improving “case management by coming up with best practice guidelines for effective coordination, communication and cooperation amongst criminal justice institutions” See A/HRC/8/43. 2 June 2008. p 5.

Moreover, in 2009, the information received from Zambia on the implementation of the concluding observations of the HRC in relation to Zambia's state party report,¹⁴⁴ revealed that the state "has successfully undertaken effective intervention measures to address the problem of congestion and poor conditions in detention places."¹⁴⁵ The measures adopted include:

- (a) The establishment of about 30 Open Air Prisons;
- (b) The transfer of prisoners from overpopulated prisons to less populated prisons;
- (c) The construction of a modern maximum security prison at Mwembeshi and the rehabilitation of Livingstone Central Prison and Kamfinsa Prison;
- (d) The introduction of a Parole system in accordance with Statutory Instrument No.101 of 2008; and
- (e) The Government has introduced community services for offenders convicted for misdemeanors as part of its plans to develop and improve on alternative measures to imprisonment. Consequently, the Prisons Act, the Penal Code 88 and the Criminal Procedure Code Chapter 89 of the Laws of Zambia have been duly amended to allow the courts to order community service as an alternative punishment to imprisonment.¹⁴⁶

Furthermore, not only is the Prisons Service constructing a milling plant in Kabwe, "to ensure that prisoners are provided with adequate food,"¹⁴⁷ but the Prison Service has also established a ranch where some cattle are being kept. In future, this, and the fact that government has embarked on supplying fertilizer to prison

¹⁴⁴ CCPR/C/ZMB/CO/3/Add.1.

¹⁴⁵ CCPR/C/ZMB/CO/3/Add.1. p 3.

¹⁴⁶ CCPR/C/ZMB/CO/3/Add.1. p 3-4.

¹⁴⁷ Times of Zambia. Zambia: *Prisons construct K 1.5 billion milling plant.*

<http://allafrica.com/stories/201108140099.html> (accessed 15 August 2011).

farms, may result in prisoners being able to receive three nutritional meals a day.¹⁴⁸

Other efforts of the state include the acquisition of blankets and uniforms for prisoners.¹⁴⁹

Therefore, although the state has made little effort in domesticating international human rights law, the state has indicated a strong intention to improve the socio-economic conditions in prisons.

The *status quo*, thus raises the question whether the South African and Indian legal systems can be approached for inspiration in relation to the protection and realization of socio-economic rights, in a situation where the principles of international human rights law have not been domesticated in national law. This will be discussed in the next chapter.

¹⁴⁸ See Mungole R. p 163-165 and CCPR/C/ZMB/CO/3/Add.1. p 3-4.

¹⁴⁹ See Mungole R. p 99 and p 160.

CHAPTER 4

TOWARDS A PROGRESSIVE CONSTITUTION AND JUDICIAL ACTIVISM

In the case of *Sara Longwe v Intercontinental Hotels*,¹⁵⁰ Musumali J, held that:

“In deciding an issue not covered by domestic legislation, a court could take judicial notice of international treaties and conventions...when they have been ratified without reservation by a state, indicating its willingness to be bound by their provisions...”

Although Musumali J took judicial notice of international law in the abovementioned case, the majority of judges in Zambia have been hesitant to apply international law when deciding cases.

A problem identified as a contributor to the *status quo* is the fact that when presenting their arguments, counsels do not base their arguments on international law. Consequently, judges are not bothered to refer to such law in their judgments.¹⁵¹

However, because the state has willingly ratified and acceded to international human rights instruments, the provisions of these instruments whether domesticated or not should be noted and applied by the courts where necessary and applicable.

With the above facts in mind, the aim of this chapter is to highlight the perceptions and practices in South Africa and India, in relation to the recognition and enforcement of socio-economic rights. The intended outcome is to develop a platform that the Zambian government, especially the legislature and judiciary can use to improve the protection and realization of the socio-economic rights of prisoners.

¹⁵⁰ 1992/HP/765 [1993] 4 LRC 221.

¹⁵¹ See Killander (ed). p 72.

South Africa and India have been chosen because the legal systems in both states have over the years undergone remarkable transformations that have involved a human rights law approach.

On the one hand, South Africa has a progressive constitution, which expressly protects socio-economic rights on the basis of human dignity, equality and freedom and furthermore, renders them justiciable. On the other hand, India has a judiciary that is willing to actively participate in the interpretation of legislation, to the extent of expanding the meaning of the right to life, to include various socio-economic rights ordinarily regarded as “Directive Principles of State Policy” in the constitution.

4.1 The South African approach

With its roots in Roman-Dutch law, the South African legal system may be regarded as one of the best legal systems in the world in so far as providing due recognition and protection of socio-economic rights. Among the reasons for this statement is the fact that the principles and rules enshrined in international human rights instruments have been incorporated into the constitution and ultimately national legislation.¹⁵²

(a) The constitution

In South Africa, the 1996 constitution expressly recognizes socio-economic rights in chapter 2.¹⁵³ Among the rights protected are the right to be detained in a safe

¹⁵² In *Du Plessis v Pienaar* 1996 (5) BCLR 658 (CC) at par 126 Justice Kriegler, remarked that the fundamental rights and freedoms in the constitution “have a poignancy and depth of meaning not echoed in any other national constitution.” Furthermore, in his article *Legal culture and transformative constitutionalism* SAJHR (1998) 146 at 153, Karl Klare is of the view that the South African Constitution “in contrast to classical liberal documents is social, redistributive, caring, positive, at least partially horizontal, participatory, multicultural, and self-conscious about its historical setting and transformative role and mission.” Therefore, the constitution contains positive elements which other constitutions do not possess.

¹⁵³ Chapter 2 is better known as the “bill of rights.”

and clean environment,¹⁵⁴ the right to food and water,¹⁵⁵ the right to access healthcare¹⁵⁶ and the right to education and access to information.¹⁵⁷ The constitution further instructs the state to “respect, protect, promote, fulfill” and “take reasonable legislative and other measures within its available resources” to progressively realize the rights.¹⁵⁸

Moreover, unlike in the Zambian legal system, in South Africa, national legislation such as the Correctional Services Act¹⁵⁹ confirms that prisoners are also bearers of the aforementioned rights entrenched in the constitution.¹⁶⁰

Another provision worth noting is section 38 of the constitution, which confirms the justiciability of socio-economic rights.

Therefore, in South Africa, constitutional socio-economic rights may be enforced by a court by hearing and passing judgments on challenges pertaining to an allegation that state or private conduct is inconsistent with a socio-economic right.¹⁶¹

In *Van Viljon and Others v Minister of Correctional Services*¹⁶² the High Court made a positive ruling by ordering the Department of Correctional Services to provide combination anti-retroviral drugs to two HIV positive prisoners to whom such drugs were prescribed by medical practitioners. The case is important firstly, because the court recognized that socio-economic rights are human rights that

¹⁵⁴ See ss 24 and 35(2)(e).

¹⁵⁵ See ss 27(1)(b) and 35(2)(e).

¹⁵⁶ See ss 27(1)(a) and 35(2)(e).

¹⁵⁷ See ss 29 and 32.

¹⁵⁸ See ss 7(2), and 25(5), 26(2), 27(2) and 29(2).

¹⁵⁹ 111 of 1998. The Act is the equivalent of the Prisons Act in the Zambian legal system.

¹⁶⁰ See the provisions of ss 7, 8, 12, 17 and 41 where the socio-economic rights in the above-mentioned provisions of the constitution are also expressly protected.

¹⁶¹ Coomans, F (ed). *Justiciability of economic and social rights: Experiences from domestic systems*. p 209.

¹⁶² 1997 (4) SA 441 (C).

every human being possesses by virtue of being human. Consequently, such rights may not be limited unnecessarily. Secondly, the court recognized the obligation on the state and state departments, in this case the Department of Correctional Services, to realize socio-economic rights.

Other substantive cases pertaining to the recognition and enforcement of socio-economic rights include: *Soobramoney v Minister for Health KwaZulu Natal*,¹⁶³ *Government of the Republic of South Africa v Grootboom*¹⁶⁴ and *TAC and Others v Minister of Health and Others*.¹⁶⁵

Therefore, in South Africa the legislature and the judiciary have done a plausible job in not only ensuring that socio-economic rights are protected on paper but that they are also subject to litigation, where persons are of the view that certain rights have been violated.

The fact that the bill of rights is very detailed in recognizing various socio-economic rights and their normative content and the fact that these rights may not unnecessarily be limited, except where it is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom,”¹⁶⁶ is an indication that the legislature recognizes these rights as necessary for the existence of dignity.

¹⁶³ SA 765 (CC). The case is important in the South African legal system in that it was the first time that the Constitutional Court had to decide on the constitutional right to healthcare of everybody, taking into consideration the scarcity of resources to fund the healthcare system.

¹⁶⁴ (1) SA 765 (CC). In this case, focus was on the right to housing in terms of s26 of the constitution. The Constitutional Court declared that the national government is vested with the responsibility to ensure that the state complies with its obligation in s26 of the constitution.

¹⁶⁵ (1) SA 765 (CC). This case highlighted the urgency of the need to realize the right to health and the right to access healthcare services. The government’s failure to provide free ART treatment to pregnant HIV-positive women was challenged, whereupon the court held that there was a duty on the state to provide such treatment.

¹⁶⁶ See s36 of Act 108 of 1996.

Furthermore, the fact that the Correctional Services Act contrary to the Zambian Prisons Act and Prisons Rules, expressly states that each prisoner has certain entitlements, is an indication of the fact that the South African legislature unlike the Zambian legislature understands and respects the importance of the principles of equality and non-discrimination.

(b) The Correctional Services Act¹⁶⁷

Firstly, section 7(1) of the Correctional Services Act requires that prisoners be “held in cells which meet the requirements prescribed by regulation in respect of floor space, cubic capacity, lighting, ventilation, sanitary installations and general health conditions. The provisions of 7(1) are identical to the provisions of Rule 10 of the SMR.

Secondly, the right to food and water is reflected in the provisions of section 8(1) which hold that “prisoners must be provided with an adequate diet to promote good health, as prescribed in the regulations.” Similar to the previous section, section 8(1) mirrors the provisions of Rule 20(1) of the SMR.

Thirdly, the obligation on the Department of Correctional services to provide every prisoner with clothing and bedding which meet hygiene and climate conditions is emphasized in section 10. Although not identical, the section is very similar to the provisions of Rule 19 of the SMR.

Finally every prisoners right to adequate medical care is recognized in section 12(2)(a). Once again the wording of this section mirrors the wording of Rule 22(1) of the SMR.

The above is an indication that in South Africa, international principles pertaining to the socio-economic rights of prisoners have not only been domesticated in

¹⁶⁷ 111 of 1998.

national law but are positively interpreted and enforced by the courts. Therefore, although the South African legal system has its flaws, the Zambian legislature and judiciary may nevertheless take a few notes in so far as the protection and realization of socio-economic rights is concerned.¹⁶⁸

4.2 The Indian approach

With a fast growing economy, India is not only among the largest growing democracies but is also emerging as a pioneer in the protection of socio-economic rights.¹⁶⁹

(a) The constitution

Similar to the Zambian legal system, the Indian legal system has its roots in the English law. Moreover, as with the Zambian and South African legal systems, in the Indian legal system, the constitution¹⁷⁰ is the supreme law of the land.

Nevertheless, although the 1950 constitution contains a liberal bill of rights, the constitution similarly to the Zambian Constitution, recognizes socio-economic rights as mere “Directive Principles of State Policy” in Part IV.¹⁷¹

Despite the legislative state of affairs, judges of the Supreme Court of India have taken it upon themselves to make use of the authority afforded to them by the constitution, to hear matters pertaining to socio-economic rights.

¹⁶⁸ The picture depicted above of the South African Constitution and the legal system in a manner indicates the necessity for legal reform in Zambia bearing in mind the discussion in chapters 2 and 3.

¹⁶⁹ Coomans, F (ed). p 237.

¹⁷⁰ The Constitution of India 1950.

¹⁷¹ The status of socio-economic rights is clarified in Article 37. According to this Article, “rights contained in Part IV shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”

For years, Indian adjudicators have made use of public interest litigation jurisdiction to rise above any objections to adjudication, based on the fact that the matter involves mere “Directive Principles of State Policy.”

Consequently, in their decision-making, adjudicators have assumed an active role in promoting socio-economic rights by extending the scope of the right to life.

In accordance with decisions of the courts, the right to life includes the “right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing, shelter, facilities.”¹⁷²

An important case reflective the dynamic role of adjudicators in protecting and promoting socio-economic rights, is the case of *Olga Tellis v Bombay Municipal Corporation*.¹⁷³

In the above-mentioned case, pavement and slum dwellers forcefully evicted and removed from the streets and slums by the Bombay municipality in terms of the Bombay Municipal Corporation Act, sued the municipality claiming that the eviction and removal deprives them of their means of livelihood and consequently right to life. However, because the Indian Constitution does not expressly recognize the right to livelihood (socio-economic right), but recognizes the right to life (civil and political right), the court was faced with determining whether the right to life can be broadly interpreted so as to include the right to livelihood.

The court held that the content of the “right to life conferred by Article 21 is wide and far reaching”¹⁷⁴ and is therefore, not only limited to the fact that life cannot be taken away. The court further explained that the right to life includes the right to

¹⁷² *Francis Coralie Mullin v The Administrator, Union Territory of Dehli* (1981) 2 SCR 516,529.

¹⁷³ 1984 3 SCC 161.

¹⁷⁴ 1984 3 SCC 161 At [79 F-H, 80 A-B].

livelihood because, “no person can live without the means of living, that is, the means of livelihood.”¹⁷⁵

Moreover, in *Bandhua Mukti Morcha v Union of India and others*¹⁷⁶ the Supreme Court of India held that bonded labour which is contrary to the Minimum Wages Act and the Bonded Labour (Abolition Act), constitutes a violation of the right to life. The reason for such violation is the fact that the right to life includes the right to dignity; therefore, such labour is a violation of human dignity.

Therefore, considering that socio-economic rights in Zambia, as is the case in India, are enshrined in the Constitution as “Directive Principles of State Policy” and considering the fact that the Zambian legislature rejected the Constitution Amendment Bill of 2010, it would be wise for Zambian adjudicators to emulate the creative role assumed by Indian adjudicators.¹⁷⁷

An active role could mean that where applicable, adjudicators broadly interpret certain rights formally categorized as civil and political rights in such a manner that socio-economic rights are catered for. Such an approach would mirror the practice by the judges of the Supreme Court of India.

Moreover, judicial activism may also entail that judges refrain from passing the sentence of imprisonment for petty crimes after critically examining the facts and circumstances of each case.

¹⁷⁵ Ibid.

¹⁷⁶ See ICJ Review, no.36 (June 1986). In this case an NGO submitted a letter to the Chief Justice alleging that workers at a certain quarry in Dehli were being forced to perform forced labour. The Chief Justice heard the application regarding it as a writ, which the constitution empowers the court to issue.

¹⁷⁷ Art 91 of Cap 1 of the Laws of Zambia establishes an independent and impartial judiciary which is only subject to the constitution. Furthermore, the judiciary is autonomous and administered by an Act of Parliament.

Therefore, a judicial activist approach towards the protection and realization of the socio-economic rights of prisoners could be instrumental in ensuring that prisoners (both convicted and unconvicted) are treated with human dignity.

Furthermore, such an approach will improve Zambia's chances of complying with the principles of both soft and hard international human rights law.

CHAPTER 5

RECOMMENDATIONS

Firstly, it is recommended that the Zambian legislature amend the constitution as proposed in the Draft Constitution Amendment Bill of 2010.¹⁷⁸ The reasons for such a proposal are evident from the arguments presented throughout this paper. The study has shown that there is a need for the constitution to be more progressive if the socio-economic rights of prisoners are to be respected and realized. Therefore, justiciable socio-economic rights of which the content and limitation of each right is clearly defined, are required in the constitution.

It is hoped that the current constitutional review ordered by the new President, Micheal Sata, will take this matter seriously.¹⁷⁹

Secondly, there is a need to either amend the Prisons Act and Prison Rules or to repeal and replace the Act and Rules so that the Act and Rules reflect the rules and principles in hard and soft international human rights law instruments, which embrace respect for the socio-economic rights of prisoners.

When amendments to the Act are considered, it is worth considering changing the term “Prison” in relation to the title of the Act and Rules as it has negative connotations. One of the impressions created by such a term is that incarcerated persons are less of human beings than those who are not incarcerated and that the aim of imprisonment is to punish perpetrators. In contrast, the term “Correctional” in relation to the South African Correctional Services Act is more welcoming as it is indicative of the notion that places of incarceration are geared

¹⁷⁸ National Constitutional Conference Act 19 of 2007.

¹⁷⁹ The Post Online. <http://www.polity.org.za/article/zambias-sata-wants-new-constitution-in-90-days> (accessed 14 October 2011).

towards rehabilitating offenders and preparing them for a life outside the correctional institution. Moreover, it implies that such places are not focused on punishing offenders of which such punishment would in all probabilities include keeping offenders in a place with horrendous socio-economic conditions which diminish their dignity.

Thirdly, it is recommended that Zambia take the necessary measures to promptly ensure the harmonization of its domestic law with international human rights law, in a timely fashion. The harmonization of domestic law with international human rights law will most probably result in the “affirmation” of the socio-economic rights of prisoners and will consequently result in the state taking more active measures to realize the socio-economic rights of prisoners around the country.

Fourthly, judges must assume a more active role in protecting the rights in question. In this regard, in the process of adjudication, judges must acknowledge the indivisibility, inter-dependency and inter-relatedness, of civil and political rights and socio-economic rights.

Fifthly, it is necessary to have internal mechanisms in place to monitor the reports and recommendations compiled by visiting judges and the steps taken to improve prison conditions. In this way, the visits will be more effective in bringing about change and respect for the socio-economic rights of prisoners.¹⁸⁰

Sixthly, in light of the high numbers of remandees succumbing to inhumane socio-economic conditions whilst awaiting trial, as well as the unavailability of transport to transport prisoners to and from court for trial, the adoption of an Audio Visual Remand System (AVR) is recommended.

¹⁸⁰ For instance, the copies of the report must be made available to prison officials, who must then confirm receipt of the recommendations to the relevant body.

As an important development in criminal law, the AVR system is currently in operation in South Africa.¹⁸¹

In accordance with the system, cameras are installed in correctional services facilities and in court. In this way, a judge or magistrate is able to conduct the pre-trial stage of criminal proceedings, from the courtroom, whilst the accused remains in the detention facility.

Consequently, in the long run, the system will do away with the costs associated with transporting an accused to and from court and excuses pertaining to the unavailability of transport to transport remandees to court, will not suffice. Moreover, from a human rights law perspective, the socio-economic and civil and political rights of remandees, will be advanced because remandees will not be detained unnecessarily.¹⁸²

Last but not least, the government must allocate more resources to the Prisons Service, so as to allow the Service to realize the socio-economic rights of prisoners. The building of more prisons and the reformation of sentence policies to promote non-custodial sentences is must also be considered.

¹⁸¹ In 2007, Cabinet “approved a package of seven fundamental and far-reaching transformative changes that must be adopted and implemented in an integrated and holistic manner to achieve a new dynamic and coordinated Criminal Justice System.” The Audio Visual System is among such changes. The system has been operational since June 2011.

See *Protocol on Procedure to be Followed in the Audio Visual Remand (AVR) Process*. p 3. www.capelawsoc.law.za/docs/AVR%20Protocol.pdf (accessed 10 October 2011).

¹⁸² Witten J. *Video link plan to reduce case backlog*. <http://www.iol.co.za/news/crime-courts/video-link-plan-to-reduce-case-backlog-1.1080005> (accessed 10 October 2011).

CHAPTER 6

CONCLUSION

The majority of prisons in Zambia are heavily congested, buildings are dilapidated to the extent that they are inhabitable, sanitation is poor with no provision for privacy, the diet is inadequate in both quality and quantity, there is poor access to medical care and an absence of kitchen cutlery, bathing and washing soap/detergent.

Among the reasons for the absence of the basic necessities of life is the fact that the Prison Service is underfunded by the government.

Additionally, the fact that at national level the constitution does not impose an express legal obligation on the government to recognize and enforce socio-economic of persons residing in the Republic of Zambia, including prisoners is a major point of concern.

Furthermore, the findings of the study conducted indicate that neither the constitution, the Prisons Act nor the Prisons Rules expressly recognize and protect the socio-economic rights of prisoners. The *status quo* may be attributed to the categorization by the constitution of socio-economic rights as “Directive Principles of State Policy.”

“Directive Principles of State Policy” are defined as mere guidelines for the executive, legislative and judiciary that may be considered to develop and implement national policies, make and enact law and to apply the constitution. Consequently, one is forced to rely on general law to implement the socio-economic rights of prisoners and such law does not necessarily address specific issues pertaining to the socio-economic rights of prisoners.

Furthermore, one can draw the conclusion that the constitutions failure to recognize socio-economic rights as justiciable rights has negatively impacted on

the provisions of the Prisons Act and Prisons Rules, in so far as the socio-economic rights of prisoners are concerned. One can further conclude that the Act and Rules have run their course in so far as protecting and realizing the socio-economic rights of prisoners.

Moreover, a critical analysis of the relevant international and regional human rights law instruments, Zambia's State Party Reports to the C ESCR, the HRC and the African Commission on Human and Peoples' Rights and the Concluding observations and Recommendations of the aforementioned bodies, reveals that Zambia is in violation of a number of provisions in the UDHR, the CCPR, the ICESCR, the ACHPR, the SMR, the Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment, the Basic Principles for the Treatment of Prisoners and the Kampala Declaration on Prison Conditions in Africa. Therefore, the treatment of prisoners and prison conditions in Zambia falls short of international and regional minimum standards.

As a final point, the study and conclusions above serve as sufficient evidence of the present need for legal reform in Zambia, if the socio-economic rights of prisoners are to be taken seriously.

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